Office - Supreme Court, U.S.
FILED
DEC 15 1983
ALEXANDER L. STEVAS
CLERK

83-5924
Case No.

IN THE

SUPREME COURT OF THE UNITED STATES

---

PAUL BEASLEY JOHNSON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

---

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

---

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

WILLIAM C. McLAIN
ASSISTANT PUBLIC DEFENDER
CHIEF, CAPITAL APPEALS

Hall of Justice Building
455 North Broadway Avenue
Bartow, Florida 33830
(813)533-1184 or 533-0931

ATTORNEYS FOR PETITIONER

Case No.

IN THE

SUPREME COURT OF THE UNITED STATES

---

PAUL BEASLEY JOHNSON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

---

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

---

## QUESTION PRESENTED

Whether for purposes of the rule announced in Massiah v. United States a jail inmate who has previously acted as an informant for the State continues to be an agent of the State when he, on his own initiative but for the State's use, elicits incriminating information from another inmate housed near him who has been indicted for a capital offense?

## TABLE OF CONTENTS


| | PAGE NO. |
|---|---|
| OPINIONS BELOW | 4 |
| JURISDICTION OF THE SUPREME COURT | 4 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED | 4 |
| STATEMENT OF THE CASE | 5 |
| REASONS FOR GRANTING THE WRIT | 7 |
| CONCLUSION | 9 |
| APPENDIX: | |
| 1. Opinion of the Supreme Court of Florida in Johnson v. State | A1 |
| 2. Order denying rehearing in Johnson v. State | A11 |
| 3. Motion to suppress statements | A12 |
| 4. Transcript of hearing on motion to suppress | A15 |
| CERTIFICATE OF SERVICE | |

## TABLE OF AUTHORITIES


| | PAGE NO. |
|---|---|
| Brewer v. Williams<br>430 U.S. 387 (1977) | 7,8 |
| Massiah v. United States<br>377 U.S. 201 (1964) | 7,8 |
| State v. Smith<br>482 P.2d 863 (Ariz.1971) | 8 |
| Thomas v. Cox<br>708 F.2d 132 n.2 (4th Cir. 1983) | 7 |
| United States v. Henry<br>447 U.S. 264 (1980) | 7,8 |
| Amend. VI, U.S. Const. | 4 |
| Amend. XIV, §1, U.S. Const. | 4 |
| Title 28, U.S. Code, §1257(3) | 4 |
| Rule 17, U.S. Supreme Court Rules | 4 |

## OPINIONS BELOW

The opinion and judgment of the Supreme Court of Florida sought to be reviewed via this petition is not yet officially reported, but it is reproduced in the appendix. (A1-10)[1/]

## JURISDICTION OF THE SUPREME COURT

The Supreme Court of Florida issued the opinion and judgment in this case on August 25, 1983. (A1-10) Petitioner filed a motion for rehearing which was denied on October 26, 1983. (A11) Petitioner asserted below and asserts here a deprivation of his rights as guaranteed under the United States Constitution. Title 28 United States Code, Section 1257(3), and Rule 17 of the United States Supreme Court Rules confers certiorari jurisdiction in this Court to review the judgment in this case.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Amendment VI to the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defence.

2. Amendment XIV, Section 1, to the Constitution of the United States:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

---

1/ References to the Record on Appeal are designated by an "R" followed by the appropriate page number. References to the appendix to this petition are designated by an "A" followed by the page number.

## STATEMENT OF THE CASE

A Polk County, Florida, grand jury indicted Petitioner for three first degree murders, two robberies, two attempted murders, a kidnapping and an arson. (R2219-2224) He proceeded to a jury trial on the charges in Lake County, Florida, on a change of venue. (R2287-2289,2339) The jury found Petitioner guilty of all nine counts of the indictment, and at a separate penalty proceeding, the jury recommended a death sentence by a seven to five vote. (R1785-1786,1794) Circuit Judge Randall G. McDonald adjudged Petitioner guilty and sentenced him to death on each of the three murders, life for each of the two robberies, fifteen years for the kidnapping and the arson, and thirty years for each of the two attempted murders. (R1796-1799,2420-2435)

Prior to trial, Petitioner moved to suppress admissions of guilt that he allegedly made to another jail inmate, James Smith. (R942-957,1901-1966,2301-2303)(A12-65) Smith was also a pretrial detainee in the Polk County Jail (R1903-1904), and had served as a police informant in the past. (R1907-1908)

Petitioner was arrested on January 10, 1981. (R1062-1076,1926) Counsel was appointed to represent him on the same day. (R2139) On January 14, 1981, Petitioner filed a written notice that he was exercising his right to remain silent and his right to counsel. (R2143) The original indictment charging Petitioner was returned on January 23, 1981. (R2147-2150) Later, James Smith engaged Petitioner in conversation in the book-in area where inmates use the telephone. (R12,1924) According to Smith, Petitioner then related some incriminating information about the crimes. (R1904-1905)

After his initial conversation with Petitioner, Smith spoke with Ben Wilkerson, a sheriff's investigator. (R1906, 1922-1924) Smith had worked as an informant for Wilkerson in the past (R1906-1907,1922); the last time shortly before Smith's latest arrest. (R1906-1907) Smith continued to be a potential

witness in on-going investigations and had spoken to Wilkerson on other matters four weeks before Smith's first conversation with Petitioner. (R1926) Smith told Wilkerson about his conversation with Petitioner but said that he had trouble remembering everything Petitioner said. (R1923) Wilkerson suggested that Smith take notes in the future. (R1915-1916,1923-1924)

The next day, February 6, 1981, Wilkerson returned to the jail to talk to Smith and brought two investigators who were working on Petitioner's case. (R1907-1908,1929-1933) None of the investigators specifically directed Smith to obtain particular information from Petitioner. (R1930-1931,1932-1933) Two days later, Smith was moved from his cell on the third floor to a cell the second floor adjacent to Petitioner's. (R1129-1130,1911-1912) From that vantage point, Smith continued to talk to Petitioner and to ask him questions about his charges. (R1912-1914) On four separate occasions, Smith turned over notes of these conversations to sheriff's investigators. (R1915-1916,1924) Petitioner did not know that Smith was acting as an informant. (R1927-1928)

Smith said that he did not ask for any benefit or favorable treatment in exchange for the information. (R1914) However, he admitted that he asked for and received help from Wilkerson regarding a child custody problem Smith had after his recent divorce. (R1915-1917) Furthermore, Smith received two concurrent five year sentences instead of a potential twenty-five years imprisonment he faced on several charges. (R1124-1127) The State also gave a favorable recommendation on Smith's behalf to the parole commission. (R1320)

At the motion to suppress hearing (A15-65), Petitioner claimed that Smith was acting as a state agent and had illegally obtained incriminating statements from Petitioner in violation of Petitioner's right to counsel. The trial court denied the motion. (A61-65) On appeal, the Supreme Court of Florida affirmed and said,

> After hearing both sides' testimony, the court found Malone distinguishable from the instant case and denied the motion to suppress. A ruling on a motion to suppress is presumptively correct, and a reviewing court should interpret the evidence and reasonable inferences and deductions drawn from the evidence in a manner most favorable to sustaining the trial court ruling. McNamara v. State, 357 So.2d 410 (Fla.1978). Here, the trial court held that the detectives did not direct Smith, either directly or surreptitiously, to talk with Johnson or to take notes on their conversations. Henry and Malone do not impose on the police an affirmative duty to tell an informer to stop talking and not approach them again nor do they require that informers be segregated from the rest of a jail's population. We agree with the trial court that this case presents a close question on whether Smith had become an agent of the state, but we find the ruling that he had not to be supported by the evidence.

(A3)

## REASONS FOR GRANTING THE WRIT

### I.

This Court has repeatedly held that once adversary proceedings have been commenced against an individual--whether by way of formal charge, preliminary hearing, indictment, information or arraignment--he has a right to legal representation if the government questions him. United States v. Henry, 447 U.S. 264 (1980); Brewer v. Williams, 430 U.S. 387 (1977); Massiah v. United States, 377 U.S. 201 (1964). However, this Court has never defined who qualifies as an agent of the government for purposes of the well-settled rule. See, Thomas v. Cox, 708 F.2d 132,135 n.2 (4th Cir. 1983). Instead, the three principal decisions that define the Sixth Amendment's protection where a government agent elicits incriminating information from an accused in the absence of counsel, assume the "agency" of the person eliciting the information and focus on whether the agent has "deliberately elicited" the information.

In Massiah, this Court held that the defendant's right to counsel was violated "when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been in-

dicted and in the absence of his counsel." 377 U.S. at 206. There the direct elicitor was a co-defendant, turned government informer, who had allowed the government to install a radio transmitter in his car for the purpose of obtaining Massiah's statements. The "agency" of the co-defendant in those circumstances was simply assumed.

In Brewer, this Court held that a police detective's "Christian burial speech" constituted deliberate interrogation so as to violate the defendant's right to counsel. Since the direct eliciter was a police officer "agency" was not in issue.

In Henry, government agents contacted an inmate at the jail where Henry was awaiting trial for bank robbery. For some time prior to the meeting the inmate had been engaged as an FBI informant, receiving monitary payment on a contingent fee basis. The record did not disclose whether the inmate was contacted for the purpose of acquiring information about Henry. During the contact, an agent instructed the inmate to be alert to statements made by other prisoners, but not to initiate any conversation with Henry regarding the robbery. The inmate then developed a relationship of trust and confidence with Henry such that Henry revealed incriminating information to him. The informant provided the agent with the information and was paid. In holding that the government had elicited incriminating information from the defendant in violation of Massiah, this Court again focused on whether the information had been "deliberately elicited." Although this Court considered the question of "agency" of sufficient import to require attention in Henry, the existence of agency was assumed from the facts of prior employment as an informer and a specific fee arrangement for information against Henry. See, 447 U.S. at 270.

The lack of clear guidance in this area has led to conflict among the state courts. In State v. Smith, 482 P.2d 863 (Ariz.1971), the Supreme Court of Arizona found, on facts

similar to those in Petitioner's case, an agency relationship between an inmate and the government. The Court stated:

> ***this court does not live in the never-never land of Peter Pan.
> Given the following facts: In 1966, A supplies information to B pursuant to an agreement that in exchange for such information B will perform services for A; the information is supplied and the services are rendered; in 1967, A again supplies information to B and B again performs services for A, and in order to perform these services B by-passes the mandate of a court and the duly constituted Parole Board of this state. Are we to close our eyes to the logical conclusion that the 1967 services were also performed pursuant to an agreement, either spoken or unspoken?
> ***In our opinion, the conclusion is inescapable in this case that [the informant] expected some benefit to accrue from his assisting the state and in view of the past dealings of [the informant] with the County Attorney based upon a favor done for a favor received, that the state intended to reciprocate for such assistance.

482 P.2d at 867.

Petitioner believes that the direct elicitors in his case were acting as agents for the State. He urges this Court to grant a writ of certiorari.

## CONCLUSION

Upon the foregoing reasons, Petitioner asks this Court to grant a writ of certiorari.

Respectfully submitted,

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

BY:
WILLIAM C. McLAIN
Assistant Public Defender
Chief, Capital Appeals

Hall of Justice Building
455 North Broadway Avenue
Bartow, Florida 33830-3798
(813)533-0931 or 533-1184

Member Of The Bar Of The United States Supreme Court

## APPENDIX


| ITEM | | PAGE NO. |
|---|---|---|
| 1. | Opinion of the Supreme Court of Florida in Johnson v. State | A1-10 |
| 2. | Order denying rehearing in Johnson v. State | A11 |
| 3. | Motion to suppress statements | A12-14 |
| 4. | Transcript of hearing on motion to suppress | A15-65 |

# Supreme Court of Florida

No. 61,341

PAUL REASLEY JOHNSON, Appellant,

v.

STATE OF FLORIDA, Appellee.

Received By
AUG 2 [illegible]

[August 25, 1983]

PER CURIAM.

Paul Johnson appeals his convictions of first-degree murder and sentences of death. We have jurisdiction[1] and affirm both the convictions and sentences.

A nine-count indictment charged Johnson with three counts of first-degree murder, two counts of robbery, kidnapping, arson, and two counts of attempted first-degree murder. The jury convicted Johnson of all counts as charged and recommended a sentence of death for each of the three first-degree murder convictions. The trial court imposed the recommended death sentences as well as lesser sentences on the remaining convictions.

The charges stemmed from the following facts. Late in the evening of January 8, 1981 William Evans, a taxicab driver, picked up a fare in Polk County. After midnight, the dispatcher heard a stranger's voice several times over the cab's radio. She never heard from the driver again, and five days later his cab and body were found in separate, isolated citrus groves. The cab had been set on fire, and the driver had been shot twice in the

[1] Art. V, § 3(b)(1), Fla. Const.

head; his wallet and fare money were missing.

About 3:00 a.m. on January 9, 1981 Darrell Beasley and Amy Reid left a Lakeland restaurant. In the parking lot a man approached them, said his car would not run, and asked for a ride to a friend's house. In an isolated area the stranger asked Beasley to stop the car so that he could urinate. On returning to the car he asked Beasley to come to the rear of the car. Through the rear window, Reid saw the stranger holding a pistol on Beasley. She then locked the car doors and drove several miles to a store where she called the sheriff's department.

Deputies Allison and Darrington responded to Reid's call and drove her in their patrol car to where she had left the two men. In the meantime another deputy, Theron Burnham, radioed that he had seen a suspect on the road in question. On arriving in the area Allison and Darrington stopped their car facing Burnham's patrol car. A white male walked rapidly from a drainage ditch at the side of the road and crossed in front of the deputies' car. He fired two shots at the deputies and escaped across an open field. Allison and Darrington then found Burnham's body in the drainage ditch; he had been shot three times.

Later that day searchers found Beasley's body. He had been shot once in the head and his wallet was missing. The police arrested Johnson for these two homicides on January 10, 1981 and the following week charged him with the cab driver's murder.

As his first point on appeal, Johnson claims that a fellow inmate's testimony as to Johnson's admissions of guilt should have been suppressed under United States v. Henry, 447 U.S. 264 (1980), and Malone v. State, 390 So.2d 338 (Fla. 1980), cert. denied, 450 U.S. 1034 (1981), because the other inmate had become an agent of the state. The inmate, Smith, had worked as an informant for the sheriff's department several months prior to the incidents at issue here. After meeting Johnson by chance and having a casual conversation with him, Smith contacted the

detective he had previously worked for and told him what Johnson had said. This detective contacted the two detectives working on Johnson's case, who also spoke with Smith. Smith was moved to several different cells and eventually wound up in one next to Johnson's cell. He took notes on his conversations with Johnson and turned them over to the detectives handling Johnson's case.

At the hearing on the suppression motion Smith and the three detectives testified that Smith talked to Johnson on his own initiative, without any prompting from the detectives. The detective that Smith originally contacted said that he had told Smith that it might be in Smith's best interest to write down what Johnson said. Smith, on the other hand, testified that he decided to take notes, solely on his own, because he had trouble remembering things. The other detectives stated that they had not told Smith to talk to Johnson or to take notes. Smith testified that he thought he had been moved to the isolation cell next to Johnson's because he had been injured and because he had had a bad argument with a counselor.

After hearing both sides' testimony, the court found Malone distinguishable from the instant case and denied the motion to suppress. A ruling on a motion to suppress is presumptively correct, and a reviewing court should interpret the evidence and reasonable inferences and deductions drawn from the evidence in a manner most favorable to sustaining the trial court ruling. McNamara v. State, 357 So.2d 410 (Fla. 1978). Here, the trial court held that the detectives did not direct Smith, either directly or surreptitiously, to talk with Johnson or to take notes on their conversations. Henry and Malone do not impose on the police an affirmative duty to tell an informer to stop talking and not approach them again nor do they require that informers be segregated from the rest of a jail's population. We agree with the trial court that this case presents a close question on whether Smith had become an agent of the state, but we find the ruling that he had not to be supported by the evidence.

Amy Reid and Deputies Allison and Darrington identified

Johnson from a lineup. On appeal Johnson attacks the lineup as having been impermissibly suggestive and claims the court erred in refusing to allow his expert to testify as to the unreliability of eyewitness identification. We find no error in these points.

The United States Supreme Court set out the standard for determining the reliability of an identification, on the totality of the circumstances, even though the procedure might have been suggestive in Neil v. Biggers, 409 U.S. 188 (1972). The Court identified five factors relating to reliability: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. Id. at 199. In Manson v. Brathwaite, 432 U.S. 98 (1977), the Court reiterated that the reliability of the identification is the most important concern and that it should be determined on the totality of the circumstances. This Court adopted the Manson two-part test in Grant v. State, 390 So.2d 341 (Fla. 1980), cert. denied, 451 U.S. 913 (1981):

> (1) did the police employ an unnecessarily suggestive procedure in obtaining an out-of-court identification; (2) if so, considering all the circumstances, did the suggestive procedure give rise to a substantial likelihood of irreparable misidentification.

Id. at 343.

Johnson attacks the lineup because of its composition--only he had a suntan and blonde hair and his inmate uniform was a lighter blue than that of the other inmates in the lineup. Like the trial court, we do not find that the complained-of items made the lineup impermissibly suggestive. Moreover, we note that a sheriff's department investigator testified that none of the witnesses indicated at the lineup that these items influenced their identifications. Besides finding the lineup not to have been unnecessarily suggestive, we find that these witnesses'



AY

identifications conform to the five factors set out in Neil v. Biggers. We hold, therefore, that the trial court did not err in refusing to suppress these identifications.

Johnson attempted to call a professor of psychology as an expert witness in the field of eyewitness identification. According to Johnson, this witness would have explained both the common problems in such identifications and the general factors affecting a witness' accuracy as well as testifying about the suggestiveness of the instant lineup itself. A trial court has wide discretion concerning the admissibility of evidence and the range of subjects about which an expert can testify. Jent v. State, 408 So.2d 1024 (Fla. 1981), cert. denied, 457 U.S. 1111 (1982); Johnson v. State, 393 So.2d 1069 (Fla. 1980), cert. denied, 454 U.S. 882 (1981). Expert testimony should be excluded when the facts testified to are of such nature as not to require any special knowledge or experience in order for the jury to form its conclusions. Johnson. We hold that a jury is fully capable of assessing a witness' ability to perceive and remember, given the assistance of cross-examination and cautionary instructions, without the aid of expert testimony.[2] We find no abuse of discretion in the trial court's refusal to allow this witness to testify about the reliability of eyewitness identification.

Relying on Hall v. State, 403 So.2d 1319 (Fla. 1981), Johnson claims that he should have been convicted of no more than second-degree murder for the deputy's death. In that case Hall and his cohort struggled with a deputy sheriff over a pistol; the deputy was shot to death. On appeal we found the evidence insufficient to convict Hall of premeditated murder. Our reading of the instant record shows sufficient evidence of premeditation to

---

[2] Several other courts have reached the same conclusion about expert testimony in eyewitness identification: United States v. Thevis, 665 F.2d 616 (5th Cir.), cert. denied, 103 S.Ct. 57 (1982); United States v. Fosher, 590 F.2d 381 (1st Cir. 1979); Caldwell v. State, 594 S.W.2d 24 (Ark. Ct. App. 1980); People v. Dixon, 87 Ill.App.3d 814, 410 N.E.2d 252 (1980); State v. Helterbridle, 301 N.W.2d 545 (Minn. 1980); Nelson v. State, 362 So.2d 1017 (Fla. 3d DCA 1978).

support the conviction of first-degree murder in the deputy's death, and we find Hall inapplicable to the instant case because the evidence here is inconsistent with any reasonable hypothesis other than premeditated murder.

Johnson next claims that the trial court improperly excused a prospective juror for cause in violation of Witherspoon v. Illinois, 391 U.S. 510 (1968). After studying this prospective juror's responses to the questions asked on voir dire, we find that she unequivocally stated her opposition to imposing the death penalty. The trial court, therefore, properly excused her.

As his final challenge to the guilt-innocence phase of the trial, Johnson claims that the charges arising from the cab driver's death should have been severed from the remaining counts of the indictment. Florida Rule of Criminal Procedure 3.150(a) provides:

> Two or more offenses which are triable in the same court may be charged in the same indictment or information in a separate count for each offense, when the offenses, whether felonies or misdemeanors, or both, are based on the same act or transaction or on two or more connected acts or transactions.

A severance should be granted when necessary to achieve a fair determination of a defendant's guilt or innocence. Fla. R. Crim. P. 3.152(a)(2). Granting a severance is largely a matter of discretion with a trial court, and the burden is on the movant to demonstrate an abuse of discretion. Manson v. State, 88 So.2d 272 (Fla. 1956); Ballard v. State, 323 So.2d 297 (Fla. 3d DCA 1975).

Johnson relies on Paul v. State, 385 So.2d 1371 (Fla. 1980), where this Court adopted Judge Smith's dissent to Paul v. State, 365 So.2d 1063 (Fla. 1st DCA 1979). We find Paul distinguishable from the instant case because there the offenses occurred five weeks apart. Here, on the other hand, only hours separated the three homicides and related crimes. We do not find that a severance would have been necessary to fairly determine Johnson's guilt or innocence in the crimes charged.

Several attacks on the sentences and sentencing phase of

the trial comprise Johnson's last points on appeal. He claims that the trial court erred in its assessment of the aggravating factors and in instructing the jury on certain aggravating factors, that the standard jury instruction precludes consideration of mitigating evidence, and that the trial court should have allowed him to waive an aggravating circumstance. We find no merit to these contentions.

In a thoughtful and well-reasoned sentencing order the trial court found the following aggravating factors: previously convicted of a capital or violent felony (all three homicide charges); felony murder (all three); avoiding arrest (Burnham); pecuniary gain (Evans); and cold, calculated, premeditated manner (all three). The court found none of the statutory mitigating circumstances applicable, but did find Johnson to have been under the influence of drugs although not to the extent of being under extreme mental or emotional disturbance or extreme duress.

We find that the evidence supports the findings in the trial court order.

Johnson challenges several of these findings which we will discuss briefly. In finding that Johnson had previously been convicted of a violent felony the trial court relied on the convictions for attempted murder in this trial. This is a proper finding under King v. State, 390 So.2d 315 (Fla. 1980), cert. denied, 450 U.S. 989 (1981), and Lucas v. State, 376 So.2d 1149 (Fla. 1979). The evidence is also sufficient to support finding that Johnson killed the deputy while fleeing from a robbery. The deputy was shot only one-half hour after Beasley and only a mile and a half from the site of his death. See Griffin v. State, 414 So.2d 1025 (Fla. 1982). There is also support for the court's finding the deputy's murder to have been in a cold, calculated, premeditated manner. We note that testimony showed that, prior to starting out for the evening, Johnson stated that he would not mind shooting people to obtain money and that the deputy was shot three times. Johnson claims that the court improperly doubled up the felony murder and pecuniary gain factors in the Evans murder,

but three underlying felonies were present in that incident, i.e., robbery, arson, and kidnapping. The court, therefore, could properly find the factor of pecuniary gain. We also hold that the trial court properly found flight after commission of a robbery and for the purpose of avoiding arrest in aggravation of the deputy's murder. Evidence shows both that Johnson robbed Beasley, the second victim, and that the deputy stopped Johnson on the road as a possible suspect.

Johnson claims the court improperly instructed the jury on the aggravating factors of heinous, atrocious, and cruel and great risk of death to many people because the evidence presented would not support finding either of those circumstances. We find no error in the instructions. The list of statutory aggravating circumstances is exclusive, and we see no reason to notify a defendant of the circumstances on which the state will rely. Hitchcock v. State, 413 So.2d 741 (Fla.), cert. denied, 103 S.Ct. 274 (1982). The state must prove applicable aggravating circumstances beyond a reasonable doubt. Williams v. State, 386 So.2d 538 (Fla. 1980). The trial court did not find either of these factors, and Johnson suffered no prejudice from the complained-of instructions.

The list of mitigating circumstances set out in section 921.141(6), Florida Statutes (1981), contains modifying terms such as "extreme," "significant," "relative," and "substantial." Johnson claims that these modifiers have the effect of improperly instructing the jury to disregard all mitigating evidence if the threshold defined by the limiting words is not met. As this Court has previously commented, the statutory mitigating circumstances,

> when coupled with the jury's ability to consider other elements in mitigation, provide a defendant in Florida with every opportunity to prove his or her entitlement to a sentence less than death.

Peek v. State, 395 So.2d 492, 497 (Fla.), cert. denied, 451 U.S. 964 (1981). Moreover, we note that the court granted Johnson's requested instruction on the unlimited nature of the mitigating

circumstances. We find no merit to this claim.

Relying on Maggard v. State, 399 So.2d 973 (Fla.), cert. denied, 454 U.S. 1059 (1981), and Combs v. State, 403 So.2d 418 (Fla. 1981), cert. denied, 456 U.S. 984 (1982), Johnson claims that the trial court should have allowed him to waive the applicability of the cold, calculated, and premeditated aggravating circumstance. In Combs we stated that subsection 921.141(5)(i) "adds limitations to those elements for use in aggravation, limitations which inure to the benefit of a defendant." 403 So.2d at 421. Mitigating circumstances inure to the benefit of a defendant and can be waived by a defendant.[1] Maggard. Johnson reasons, therefore, that a defendant should be able to waive the aggravating factor set out in paragraph (5)(i). This reasoning, however, misses the point of the pertinent discussion in Combs. The above-quoted statement in Combs is in response to the claim that all premeditated murders will automatically start with one aggravating factor. We adopted that language to allay that fear and find no merit to the instant claim.

Finding no error, we affirm Johnson's convictions and sentences.

It is so ordered.

ALDERMAN, C.J., ADKINS, BOYD, OVERTON, McDONALD and EHRLICH, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

---

[1] We note that the trial court allowed Johnson to waive a mitigating factor (no significant history of prior criminal activity) in the instant case.

An Appeal from the Circuit Court in and for Lake County.

Randall G. McDonald, Judge - Case Nos. CF81-0733(Lake)
CF81-0112(Polk)

Jerry Hill, Public Defender and W. C. McLain, Assistant Public Defender, Tenth Judicial Circuit, Bartow, Florida,

for Appellant

Jim Smith, Attorney General and David T. Weisbrod, Assistant Attorney General, Tampa, Florida,

for Appellee

IN THE SUPREME COURT OF FLORIDA

WEDNESDAY, OCTOBER 26, 1983

| | | |
|---|---|---|
| PAUL BEASLEY JOHNSON, | ** | |
| Appellant, | ** | CASE NO. 61,341 |
| vs. | ** | Circuit Court Case Nos. CF81-0733 (Lake) |
| STATE OF FLORIDA, | ** | CF81-0112 (Polk) |
| Appellee. | ** | |

On consideration of the motion for rehearing filed by attorneys for appellant,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

Received
OCT

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

By: Debbie Causeaux
Deputy Clerk

cc: Hon. James C. Watkins, Clerk
Hon. Randall G. McDonald, Judge

W. C. McLain, Esquire
David T. Weisbrod, Esquire

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

CASE NO. CF81-0112

PAUL BEASLEY JOHNSON,

Defendant.

MOTION TO SUPPRESS STATEMENTS

Defendant, PAUL BEASLEY JOHNSON, through counsel and pursuant to Fla.R.Crim.P. 3.190(i), moves this Honorable Court to suppress statements and taken from him reference this case.

GROUNDS FOR SUPPRESSION

The alleged statements were made to and taken by prisoners of the county jail who were acting as government informers and were taken in violation of Defendant's constitutional rights to counsel and to remain silent. Fifth and Sixth Amendments to the United States Constitution; Article I, Section 16, of the Constitution of the State of Florida; Miranda v Arizona, 384 U.S. 436 (1966); United States v Henry, ____ U.S. ____, 100 S.Ct. 2183, 65 L.Ed 2d 115 (1980); Malone v State, ___ So.2d 338 (Fla. 1980).

EVIDENCE SOUGHT TO BE SUPPRESSED

1. Statements, oral or written, allegedly made by Defendant to James Leon Smith in the Polk County Jail between February 1, 1981, and May 1, 1981.

2. Statements, oral or written, allegedly made by Defendant to Larry Brockelbank between January 10, 1981, and April 3, 1981.

FACTUAL BASIS

1. On January 10, 1981, Defendant was arrested for charges in this cause and transported to the Polk County Jail. He remained a pretrial detainee in that jail throughout the period covered by this motion - through May 1, 1981.

2. Larry Brockelbank, a Polk County Jail prisoner at the time of Defendant's arrest continuing until approximately April 3, 1981, claims that during that period Defendant made statements to him regarding the instant cause, orally

AUG 19 1981

2301

and through five (5) letters.

3. The making of oral statements by Defendant to Brockelbank and the first of the letters was made known to the State Attorney's Office in mid-February, through Brockelbank's attorney. Brockelbank later had direct correspondence with the State Attorney's Office, including sending the other letters to that office.

4. Brockelbank elicited the alleged statements from Defendant about his case through direct questioning about the charges, evidence and true facts of the case.

5. Brockelbank did so with a fully conscious plan to inform on Defendant to the government and carried out the plan. Further, Brockelbank continued his subtle interrogation of Defendant for the government after receiving the implicit approval from the State Attorney's Office after the statements and letters were first there reported.

6. Brockelbank never informed Defendant of his own role as informer intermediary to the government concerning their communications. Brockelbank never informed Defendant that Defendant had a right to remain silent and to the advice and presence of counsel during questioning on his charges.

7. James Leon Smith, a Polk County Jail prisoner at the time of Defendant's arrest continuing until approximately May 1, 1981, claims that Defendant made several oral statements to him regarding the instant cause during that period, beginning approximately February 3, 1981.

8. Smith had been acting as a government informer aiding the Polk County Sheriff's Department in other cases before first contacting Defendant in the jail during this period.

9. Smith reported to Sheriff's investigator Ben Wilkerson that Defendant had made statements to him concerning Defendant's charges, evidence and true facts of the case. Smith was told by Wilkerson to remember things that he and Defendant discussed in the future.

10. Smith claims that he continued to receive information from Defendant and that he continued to report to Wilkerson.

11. At some point after Smith began reporting that Defendant had discussed this case with him, a decision made by Polk County Sheriff's employees caused Smith to be moved to a jail cell adjacent to Defendant's in an otherwise relatively secluded area of the jail. Smith asserts that Defendant made several statements to him about the case while they were so situated.

12. Smith elicited the information from Defendant, allegedly, after questioning and with a fully conscious plan to inform the government of the communications. Further, Smith continued to do so after receiving the implicit - if not explicit - approval of the Sheriff's Department to do so.

13. Smith never informed Defendant of his own role as informer intermediary to the government concerning their communications. Smith never informed Defendant that Defendant had a right to remain silent and to the advice and presence of counsel during questioning on his charges.

WHEREFORE, Defendant respectfully requests that this Honorable Court find that prisoners Brockelbank and Smith acted as governmental informers in eliciting the information that they allegedly did from Defendant and that they were required under existing law to duly advise Defendant of their roles and his rights. Any communications received from Defendant in violation of the law stated in this motion is subject to mandatory suppression. For the reasons and authorities stated in this motion, Defendant moves this Court to enter an Order suppressing the statements above listed.

LAWRENCE D. SHEARER
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing motion has been furnished to the State Attorney, Hall of Justice, Bartow, Florida, this the 18th day of August, 1981.

LAWRENCE D. SHEARER
Assistant Public Defender

LDS/gb

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT

IN AND FOR LAKE COUNTY, FLORIDA

| | |
|---|---|
| STATE OF FLORIDA, Plaintiff, vs. PAUL BEASLEY JOHNSON, Defendant. | CASE NO. CF81-0733 |

A hearing in the above-styled cause was held on August 28, 1981, in the Hall of Justice, Courtroom I, Bartow, Polk County, Florida, at 2:30 P. M. o'clock, before the Honorable Randall G. McDonald, Judge of the above-styled Court.

Appearances were: Hardy O. Pickard, Esquire, Assistant State Attorney; for the State; Lawrence D. Shearer, Esquire, Assistant Public Defender; for the defendant; the defendant; the witnesses; the Court Clerk; and the court reporter.

Thereupon, the following proceedings were had and taken:

THE COURT: I had failed to bring up one minor motion that I think we probably need to address at this time. Mr. Johnson, back on July the 14th you had filed in the Court file, which later came to my attention in August, a motion which essentially, I believe, at that point in time was asking for a different lawyer or a change of lawyers. It was written out on--in yellow

sheets. Do you recall this particular motion?

DEFENDANT: Yes, sir, I do.

THE COURT: OK. Have you thought about that motion any longer? Do you wish for me to hear that motion at this time or do you wish to withdraw that motion?

DEFENDANT: I was sort of sick at the time. And I just ask you to forget about it.

THE COURT: OK. You're asking me to withdraw that motion at this time and not to hear it?

DEFENDANT: Yes, sir.

THE COURT: OK. The Court will not consider that motion at this time, but I will file it for the Court file.

All right. Are we ready to proceed then, gentlemen?

MR. SHEARER: Yes, Your Honor.

THE COURT: Do you wish to take up your motion to exclude identification first or does it matter?

MR. SHEARER: I wish to do that second, Your Honor.

THE COURT: OK.

MR. SHEARER: Dr. Brigham will be here. And he's not here yet. He's coming into town to testify at that hearing. And he had a long drive. And he's not quite here yet.

THE COURT: OK.

MR. SHEARER: I would wish to first proceed with

the motion to suppress statements. Your Honor, as cited in this motion, there is alleged and has been discovered through discovery in this case that the State would intend to use two State prisoners as witnesses against Mr. Johnson alleging that he made certain statements to them reference this case. The purpose of this hearing is not to go into what the substance of those statements were, but to analyze the method on which those statements were obtained. It is the defense intention that they were obtained, if they were obtained at all, as alleged by these two witnesses, Larry Brockelbank and James Leon Smith. They were obtained in violation of defendant's right to not testify against himself and his right to counsel. The defense contends that each of these individuals in the capacity of where they got these alleged statements were acting as governmental agents in the behalf of the investigation by law enforcement and/or the State Attorney's office and to the charges in this case against Mr. Johnson.

The defense argument is based upon the cases cited in the motion. The case, of course, Miranda vs. Arizona, the case of United States vs. Henry, 1980 United States Supreme Court Case, the case of Malone vs. State, 390 So. 2d 338, Florida Supreme Court case.

Also----

THE COURT: For your information I have had the opportunity to read those cases in their entirety along with the other opinions concurring and otherwise. I've also had a chance to read your motion through.

MR. SHEARER: Thank you. Also, the defense relies upon the underlying case law, the Messiah case, which is cited in those other citations.

Your Honor, the defense made a motion to secure the two individuals involved, James Leon Smith and Larry Brockelbank. Your Honor signed an order to have Mr. Smith transported here. And he is present to testify. Mr. Brockelbank is not present. And evidently, the jail tells me they never received an order to secure. And I do not know if the Court ever actually did enter such an order. Such an order was submitted to the Court for entry. At any rate, Mr. Brockelbank is not here. And the defense is not prepared to proceed on that part of the motion, and not being able to call Mr. Brockelbank as a witness.

THE COURT: OK. I don't know what happened. We'll check into it. We may just have to continue that part of the motion until we can secure him.

MR. SHEARER: Thank you, Your Honor. Your Honor, the defense would call reference to the motion to

suppress statements allegedly made to James Leon Smith. The defense would call James Leon Smith as a witness. And I would ask the Court to consider the possibility that he may be a hostile witness to the defense. And I may or may not find it necessary to impeach him by prior inconsistent statements depending on his testimony.

THE COURT: All right. Let's see what happens.

MR. SHEARER: Yes, sir.

THE COURT: We'll talk about that should that occasion arise.

JAMES LEON SMITH,

having been produced as a witness on behalf of the defendant, and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SHEARER:

Q Please state your name.

A James Leon Smith.

Q And where do you live now?

A DeSoto Correctional Institution.

Q Are you a prisoner there?

A Yes.

Q Sir, were you previously in the Polk County jail in 1981?

A Yes, sir.

Q What periods of time were you in the Polk County

jail in 1981?

A Up until May the 1st.

Q Were you there from January 1st on through that date?

A Yeah.

Q Sir, have you stated to other persons that while in the Polk County jail you did have conversations with Paul Beasley Johnson?

A Yes.

Q Is this Mr. Johnson seated here?

A Yes.

Q I'm going to ask you some questions about the conversations you say occurred without getting into what was stated during the conversations.

A OK.

Q Do you understand my statement?

A Yes.

Q On what date if you can recall or estimate was the first conversation you had with Mr. Johnson in the Polk County jail in 1981?

A I can't recall the date. The first time was when we were in the book-in area. We visited on the phone.

THE COURT: Can you speak up a little bit--

A Yeah.

THE COURT: --so we can hear you? You may have to move a little bit closer to microphone. Go ahead.

A The first time we was in the visitation area where they got the phone booths to talk to the visitors.

Q What were you doing down there?

A I had went down to see a preacher who had come up to see me.

Q On that occasion did you have a conversation with Paul Johnson?

A Yes, I did.

Q And did you have a conversation relating to the charges or some of the charges against Mr. Johnson?

A Yes, I did.

Q Before talking about any of the charges against Mr. Johnson, did you have other types of conversations?

A Yeah, I asked him what he was down there for and he told me they were coming to get a hair sample. He didn't specify what kind of hair sample. He told me he wasn't going to let them have it until they got a court order.

Q Is that when you began talking about your case?

A Yes.

Q Did you ask him about what he was charged with?

A Yes.

Q At the time that you talked to Mr. Johnson had anybody asked you to speak to Mr. Johnson about this case?

A No.

Q Previous to that time when you met Mr. Johnson

downstairs in the visitors area, had you ever been used by the Polk County Sheriff's Department as an informant?

A Yes.

Q And did you know Investigator Ben Wilkerson?

A Yes.

Q Were you working with Mr. Ben Wilkerson on some of his cases as an informant as part of his investigation for the Polk County Sheriff's Department?

A At that time?

Q Well, at any time first of all.

A Yes.

Q And during that period of time were you so working as an informant for the Polk County Sheriff's Department?

A When I was out on bond.

Q And can you tell me what month and what years that would be?

A I think it was in '80. Right at the end of '80.

Q Toward the end of 1980. Do you remember when you were arrested?

A September '80.

Q OK. Can you tell me what length of time or how many months or weeks you worked as an informant?

A I don't know. I guess around a month.

Q Around a month?

A Somewhere around there, I reckon.

Q As an informant, did you ever carry electronic transmission devices on your body?

A Yes, I did.

Q When you were placed in jail which was around September 1980; is that correct?

A Right.

Q You were continually in jail then until, well, until the present time?

A No, I bonded out.

Q During what period of time was that?

A I came in September 21st and I stayed in there about a month and I bonded out after that.

Q And when you bonded back out, you worked for the sheriff's department as an informant; is that right?

A Right.

Q And do you know when you were rearrested?

A I think It was October or November. I'm not sure.

Q After you were rearrested and in the Polk County jail from November on, did Investigator Wilkerson have any contact with you regarding the work that you had done for him?

A I think he came to see me one time.

Q And did he--at that time did he discuss your work as an informant for him?

A We discussed some things.

Q Were you--did you consider that you were a



1907
A-23

continuing potential witness reference to any investigations that you had cooperated with?

A Yes.

Q After--excuse me. Going back again to the time when you say you talked to Mr. Johnson in the visitation area the first time in 1981, you say at that time that you discussed with Mr. Johnson something about his case; is that right?

A Right.

Q Did you later report this to any persons with the Polk County Sheriff's Department?

A Yes, I did.

Q When did you do that?

A I don't know. I believe it was a couple of days after. I'm not sure.

Q Who did you report it to?

A I can't remember his name. He was a detective over at the sheriff's department.

Q Was it Ben Wilkerson?

A No, it was another detective.

Q Was it Troelsen?

A I called Troelsen and Troelsen was busy. And another guy--I think it was him, Mr. Troelsen and another deputy.

Q Did you tell them the substance of the conversation

that you say you had with Mr. Johnson?

A Yes, I did.

Q Did they discuss with you the possibility that you might have future conversations with Mr. Johnson about his case?

A Would you repeat that over?

Q When you met with those investigators, did they discuss with you the possibility that you might have future conversations with Mr. Johnson about his case?

A I don't understand what you mean by "possibility".

Q OK. Did you talk to them about the--that it might happen that you might talk to Mr. Johnson about his case at another time, later?

A I don't think so.

Q Did they ask you to record any conversations you had with Mr. Johnson in any way?

A No. I would like to say something. When I seen Mr. Troelsen the other day, well, there again, Ben, I mean, Ben Wilkerson came in a little later on and I talked to him.

Q Was that that same day?

A Yeah.

Q Did you tell Mr. Wilkerson also about the conversation you had with Mr. Johnson?

A Yes.

Q This is the same Ben Wilkerson who you had been

working with in his investigation; is that right?

A Right.

Q Did you discuss with Mr. Wilkerson the possibility of--let me rephrase that. Did you discuss with Mr.--Investigator Wilkerson that you might talk to Mr. Johnson in the future?

A Yes.

Q And what did Investigator Wilkerson say to you about talking to Mr. Johnson in the future?

A Nothing.

Q Did he ever ask you to record or make any notes about any conversations you had with Mr. Johnson?

A No.

Q How about at a later time, did he ever ask you to make any notes?

A No.

Q You did begin to take notes; is that correct?

A Yes.

Q Whose idea was that?

A Mine.

Q Did anybody ever suggest that to you?

A No.

Q When you reported this to the investigators, was that conversation downstairs in the visitors area the only conversation area you had had with Mr. Johnson to that point?

A Well, I was in the cace on the second floor one time when he was talking to Little Rick.

Q Did he talk to you about his case on that time?

A We spoke. He was mostly talking to Little Rick.

Q Were there any other times you had a conversation with Mr. Johnson before you spoke to the investigators about what you had talked about?

A Yeah, I seen him one time in the hallway.

Q What hallway was that?

A Second floor.

Q And during that time that you spoke with Mr. Johnson in the hallway on the second floor, was there any conversation about his case or his charges?

A Yeah, there was a conversation between us, but I can't remember exactly what was said now.

Q You mentioned now three conversations with Mr. Johnson that had taken place by the time that you spoke to the investigators. Were there any others?

A It was somewhere around two or three, somewhere in there.

Q At the tire that you spoke to the investigators, where were you being housed in the Polk County jail?

A I think it was on the third floor.

Q Do you know at that time where Mr. Johnson was being housed?

A No.

Q Was he anywhere in the cell near you?

A No.

Q After talking to the investigators did you again have conversations with Mr. Johnson about his case?

A I don't think right after that, no, not exactly.

Q How long after that did you next have a conversation with Mr. Johnson about his case?

A A couple of days. I'm not sure.

Q Do you know where that happened?

A I think it was seven block or eight block. I can't remember exactly. It was two cells side by side in the back.

Q Were you in a cell beside Mr. Johnson?

A Yes.

Q When did you get moved to that cell?

A After me and the counselor, we had a pretty bad argument and my arm got cut up.

Q You were moved from the cell you had on the third floor to a cell in sever or eight block; is that right?

A Right.

Q The cell in seven or eight block; is that a single cell?

A Yes.

Q And where--once you were moved, where were you

placed in relation to Mr. Johnson's cell?

A I think it's seven block. I'm not sure.

Q In relation to Mr. Johnson's cell, where were you compared to that?

A Right beside him.

Q Was anybody else nearby in the other cells?

A There was a cell--there was a 12 man cell beside it and some cells behind us.

Q Were there any cells directly across from you?

A No.

Q Is this kind of--those particular two cells, are they in kind of an isolated area?

A Yes.

Q And you've told investigators, haven't you, that while you were next door to--in the next cell to Mr. Johnson you had some conversations with him about his case; is that right?

A Correct.

Q Did you ask him about his charges and how his case was going?

A Yeah, and he would just come out and tell me.

Q Sometimes he would?

A Well, you know, we would be talking about all the while we were back there.

Q Sometimes you'd ask him about his case and sometimes

he'd volunteer things; is that right?

A Yeah.

Q Did you make any notes of this?

A Yes.

Q And how did you do that?

A With an ink pen and paper.

Q Excuse me?

A With an ink pen and a piece of paper.

Q And what type of notes were those?

A Just, you know, what had been said during the conversations.

Q Why did you take those notes?

A I just took them.

Q Excuse me?

A I just took the notes.

Q For what reason?

A Because I was going to give them to the State attorney.

Q Did you have any motive for giving them to the State Attorney, any plans?

A Yeah, I didn't think it was right.

THE COURT: I didn't hear that last response. What did you say?

A Yeah, because I didn't think it was right what he had done.

THE COURT: All right.

Q Did you have any more meeting with the investigators of the Polk County Sheriff's Department?

A Well, I gave them notes and they were supposed to turn them over to the State attorney's office.

Q Who did you meet with when you gave them the notes?

A Ben Wilkerson.

Q Do you recall the first time you gave notes to Ben Wilkerson?

A Yeah.

Q What did he say?

A No, sir, he just told me if I wanted to see the State Attorney, I could go downstairs. I can't remember the conversation.

Q Did he say anything about these are good or anything like that?

A I think he said it would help me remember. I don't remember exactly what was said.

Q Did he ever say these looked good?

A I can't remember it's been a while back.

Q And Mr. Wilkerson told you that if it helped you to remember better to go ahead and write them down; is that right?

A I think that was the conversation.

Q How many times did you turn in notes to Mr. Wilkerson?

A I think three or four times.

Q Could it have been more?

A It could have been.

Q How long were you in a cell next to Mr. Johnson?

A I don't know. A pretty good while.

Q Is Mr. Wilkerson doing anything to help you?

A No.

Q Is he helping you with the family problem?

A No, not on that he wasn't.

Q What do you mean by "not on that he wasn't"?

A Well, I had asked him already before that. He knew I had the problem. And I asked him would he check into it for me.

Q Did you tell me in a deposition that you were helping Ben, in return Ben was going to try to help me get my kids when I got through with the divorce?

A I probably said something like that in the deposition. I wish he would help me get my kids. I worked for him when I was out on bond.

Q What was the problem with your children?

A We just got a divorce.

Q Were there custody proceedings?

A Yes.

Q Are they ongoing? How long did those custody proceedings continue?

A What are you talking about, the divorce?

Q Yeah.

A I don't know. She filed for divorce in December and in February it was final.

Q What happened after you were moved from the cell away from Mr. Johnson?

A I think I went to second floor isolation.

Q Do you know when that was?

A No.

Q When you spoke with Mr. Johnson and had conversations about his case, did you ever tell him that you were reporting the conversations to the Polk County Sheriff's Department?

A No.

Q Did you ever tell him in any way that you were an informant or that you were an aide to the Polk County Sheriff's Department investigators?

A No.

Q Did you ever tell him he had a right to remain silent and a right to have counsel present when you talked to him?

A No.

Q MR. SHEARER: No other questions of this witness.

THE COURT: Thank you very much. Mr. Pickard, you may inquire.

MR. PICKARD: Just briefly.

CROSS-EXAMINATION

BY MR. PICKARD:

Q Mr. Smith, you knew Ben Wilkerson already; did you not?

A Correct.

Q You had worked with him on other cases?

A Correct.

Q Those other cases had nothing to do with Mr. Johnson; did they?

A That's correct.

Q OK. And you were placed in the Polk County jail or you were in there in November or December or somewhere along in that regard?

A Right.

Q And do you remember when Mr. Johnson was put in the jail?

A I can't remember the date or nothing or like that. I can't remember the date or nothing.

Q OK. Who was the first police officer that you ever talked to about Johnson?

A I believe I called Mr. Troelsen and he was out. And then Mr. Wallace and Mr. Troelson both came up there.

Q Had you already talked to Ben Wilkerson before talking to Troelsen and Wallace?

A No.

Q OK. At the time that you talked to the first police officer, that you talked to whoever it may have been, had you already had conversations with Johnson about his case?

A Yes.

Q Had any police officer told you to talk to Johnson about his case?

A No.

Q How long had it been since you had talked to Ben Wilkerson?

A I guess a couple or three weeks, something like that.

Q Do you know when it was?

A It was back before I got locked up.

Q The last time you talked to Ben Wilkerson, did it have anything to do with Johnson?

A The last time before I came to jail?

Q Right.

A No.

Q Did he tell you to go talk to Johnson or did any police officer ever tell you at any time to go talk to Johnson and try to get information from him?

A No.

Q You said at one point in time you were up on the third floor and were transferred down to the second floor?

A Right.

Q At whose request was that done or why was that done?

A Well, there was two reasons. One of them was I got my arm cut. And the second reason, I got into a little argument with my counselor up there. She's a woman. And I guess it was my punishment for getting into an argument with Kathy, the counselor.

Q So you requested a transfer?

A I didn't really request it. You know, they just moved me, because they've got DR's and stuff, you know, when you do something wrong.

Q OK.

A They put me in some kind of isolation either the third floor or second floor.

Q Did you request specifically to go down there where Johnson was?

A No.

Q OK. That's just--that's the--that's where they have the isolation cells; is that right?

A That's the old jail isolation. There's third floor isolation and second floor new isolation.

Q Is that where they normally put people who get a bunch of DR's or have problems in the jail?

A If the other isolation is full, yes.

MR. PICKARD: That's all, Your Honor.

THE COURT: Thank you very much. Any redirect?

MR. SHEARER: Just one or two things, Your Honor.

REDIRECT EXAMINATION

BY MR. SHEARER:

Q Mr. Smith, when you were moved downstairs to the second floor on your request, the first cell you went to was not the one next to Mr. Johnson, was it?

A No, I think it was in eight block.

Q You went to a cell in eight block?

A Yes.

Q Is that an individual cell?

A Right.

Q Was there anything wrong with that cell?

A The lights was out in the cell block.

Q And you were later moved to the cell next to Mr. Johnson; is that right?

A Right.

Q How many days later was that?

A I think it was the same day. I'm not sure.

MR. SHEARER: No other questions.

THE COURT: Thank you. May this witness then step down?

MR. SHEARER: Yes, Your Honor.

THE COURT: OK. Thank you very much, Mr. Smith. You may step down.

(Witness excused.)

MR. SHEARER: I call Investigator Ben Wilkerson.

BEN WILKERSON,

having been produced as a witness on behalf of the defendant and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SHEARER:

Q Please state your name and occupation, sir.

A Ben Wilkerson, investigator, Polk County Sheriff's office.

Q Sir, you were here in the courtroom, weren't you, when James Leon Smith was just testifying?

A Yes, I was.

Q Do you know James Leon Smith?

A Yes, I do.

Q Did Mr. Smith cooperate with you as he testified as an informant during 1980?

A Yes, he did.

Q Were his statements in that regard substantially correct?

A Yes, they were.

Q At the--are you familiar with--excuse me. Do you recall a conversation such as Mr. Smith testified to where he discussed with you for the first time the conversations he had with Mr. Johnson about Mr. Johnson's case?

A Yes.

Q OK. At that time were you an investigator on the

case of State of Florida vs. Paul Beasley Johnson?

A No, I was not.

Q You were investigating other cases; is that correct?

A Right.

Q And previous to him telling you about that conversation or conversations that he had had up to that time with Mr. Johnson, had you ever asked him to have conversation with Paul Beasley Johnson?

A No, I hadn't.

Q After he told you what he told you about those conversations, did you ever suggest to him that he keep any notes or memos of what was told to him?

A I believe I did. And he brought up the fact that he would not be able to remember half of the things that he had told him about that day. And I said, "Well, it would be in your best interest to write them down."

Q Did you talk about if he heard further things from Mr. Johnson that it would be better off for him to write them down?

A Specifically on that particular meeting, it was strictly the information he gave me at that time.

Q Did you ever suggest to him that he--did ever at any time you suggest to him that he keep notes of conversations that he had with Mr. Johnson at future times?

A I don't recall.

Q Is it possible?

A Having previously suggest that he write down what he reported to him, yes, I would have to say it's possible.

Q Did you report this conversation to those investigators for the sheriff's department who were handling the Johnson investigation?

A Yes, I did.

Q At later times did Mr. Smith turn in to you notes that he had made regarding conversations with Mr. Johnson?

A Yes, he did.

Q And on how many different occasions did you receive these?

A Probably three or four. If you need a specific number, I would have to check.

Q Was it at least three or four?

A I'm sure it was.

MR. SHEARER: No other questions.

THE COURT: Thank you. Mr. Pickard.

CROSS-EXAMINATION

BY MR. PICKARD:

Q Ben, what was the date that you first had contact with Mr. James Leon Smith in reference to Paul Johnson's case?

A February 5th, 1981.

Q How did that come about?

A OK. I had a telephone message taken by one of the secretaries in our Lakeland office that James Leon Smith needed to see me. And that was taken in the early part of the week. And it wasn't until February the 5th which I believe was a Thursday at 1:30 in the afternoon that I finally got a chance to get down here to see what he needed.

Q So he requested to see you, you did not go to him; is that right?

A Right.

Q And you had a discussion with him on Febuary the 5th?

A Correct.

Q Did he--and I'm not going tc ask you to relate what he told you. But did he give you information as to things that Paul Johnson had allegedly told him?

A Correct.

Q And these were things that had already been said prior to Smith coming to you?

A Correct.

Q Had you told him previous to that to try to talk to Mr. Johnson to get any information from him?

A No, I had not.

Q Were you aware of any other police officers that did?

A No, sir.

Q How long had it been prior to February the 5th that you had seen James Smith?

A Probably in excess of a month, because I was in school three weeks in January. And it may have been four or five days.

Q OK. Had you seen him say between January 9th and February 5th or would it have been back before January 9th that you had last seen Smith?

A It would have been prior to January 9th.

MR. PICKARD: I think the Court--I would ask the Court to take judicial notice, I think the court file reflects that Mr. Johnson was not arrested and put in the county jail until January the 9th.

THE COURT: Let the record so reflect.

Q So the last time you talked to James Smith about his giving you information on cases or working on cases was before Johnson was even arrested?

A Correct.

Q And at that time obviously you did not ask him to talk to Paul Johnson or to anyone in particular; did you?

A Correct.

Q OK. And after Mr. Smith told you what he knew, you then informed the investigators who were actually working the Johnson case about it; did you not?

A That's correct.

Q Did you ever--after you found out that James Smith had been talking with Paul Johnson or Mr. Johnson had been giving him information, did you give Smith any instructions on what to do in the future as far as going back and talking to Johnson again and getting more information or anything along those lines?

A No, sir, I did not.

Q Did you tell him--give him any instructions at all?

A No, sir.

MR. PICKARD: That's all.

THE COURT: Thank you. Any redirect?

MR. SHEARER: No, Your Honor.

THE COURT: Thank you very much. You may step down. May he be excused?

MR. SHEARER: Yes, sir.

THE COURT: OK. You're excused.

(Witness excused.)

MR. SHEARER: I would call Paul Beasley Johnson.

PAUL BEASLEY JOHNSON,

having been produced as a witness in his own behalf and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SHEARER:

Q Please state your name, sir.

A Paul Beasley Johnson.

Q Sir, did you see the fellow in court who identified himself as James Leon Smith?

A Yes, I did.

Q Have you ever seen him before?

A Yes, I have.

Q Did you ever see him in the Polk County jail between January--early January 1981 and May 1st, 1981?

A Yes, I have.

Q During that period of time, going up to May 1st, 1981, did you have any knowledge whatsoever that he was a government informer or was acting on behalf or in favor of the Polk County Sheriff's Department in investigations?

A No, I didn't.

MR. SHEARER: No other questions, Your Honor.

THE COURT: Thank you. Do you have any questions?

MR. PICKARD: Just one.

CROSS-EXAMINATION

BY MR. PICKARD:

Q Mr. Johnson, did you have a discussion with James Smith about your case?

MR. SHEARER: Objection, Your Honor, that's not responsive to direct examination. I asked nothing about a conversation.

MR. PICKARD: I think that's the whole point of what we're here for.

MR. SHEARER: Your Honor, that's not the point of this witness' testimony. He's trying to get admissions from the defendant from this hearing. The only question I asked was regard to knowledge of the person being an informant. I asked nothing about conversations.

THE COURT: I'll sustain your objection. I think it's beyond the scope of his direct.

MR. PICKARD: I have no questions then.

THE COURT: Thank you very much. You may step down, Mr. Johnson.

(Witness excused.)

MR. SHEARER: Your Honor, the defense has no further witnesses for this motion to suppress statements allegedly made by the defendant to James Leon Smith.

THE COURT: Thank you. Does the State wish to call any witnesses?

MR. PICKARD: Yes, sir, I have just one witness I'd like to call.

THE COURT: Fine. Thank you. If you'll call that witness.

MR. PICKARD: Investigator Wallace.

ROBERT WALLACE,

having been produced as a witness on behalf of the State and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PICKARD:

Q Could you state your name, please, sir, and your occupation or profession?

A Robert Wallace, investigator with the Polk County Sheriff's Department.

Q Mr. Wallace, did you participate in the--participate with other officers in the investigation of the various cases where Mr. Paul Johnson has been charged?

A Yes, sir.

Q Did you come in contact with James Leon Smith at some point in time?

A Yes, sir.

Q All right. When was that?

A On the 6th of February.

Q How did that come about?

A Investigator Wilkerson came to me and told me that James Leon Smith had information in regards to that case and I needed to talk to him.

Q What did you do then?

A Myself and Investigator Wilkerson went into the room and talked to James Leon Smith. And I think we briefly went over that he had conversation with Johnson. So myself and Investigator Troelsen then took a taped statement from Smith in regards to what Johnson had told him.

Q And the information that Smith gave you on that day

being James Smith was information that he had previously at some point in the past obtained from Mr. Johnson?

A Yes, sir.

Q Had you in the past asked Smith to contact Johnson and get information from him?

A No, I did not.

Q Are you aware of any other police officer involved in the investigation who had requested Mr. Smith to get information from Paul Johnson?

A No, I do not.

Q All right. After the statement was obtained on the 6th, did you make any requests of Mr. Smith for future actions as far as attempting to get information from Paul Johnson?

A No, sir, I did not solicit any more assistance.

MR. PICKARD: OK. That's all, Judge.

THE COURT: Thank you. You may cross.

MR. SHEARER: No questions.

THE COURT: May he step down?

MR. PICKARD: Yes, sir.

THE COURT: Thank you.

(Hearing concluded.)

MR. PICKARD: Judge, I do have one other witness that I'd like to briefly call on this.

THE COURT: OK. Go ahead.

MR. PICKARD: All right. It's Earl Troelsen. Not

Earl Troelsen, George Elliott.

GEORGE ELLIOTT,

having been produced as a witness on behalf of the State and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PICKARD:

Q Could you state your name and your occupation, sir?

A George Elliott, investigator with the Polk County Sheriff's Department.

Q Mr. Elliott, were you the chief investigator assigned to the cases involving Mr. Johnson?

A Yes, sir, I was.

Q All right. As such were you familiar with what the other officers involved in the case were doing and the various assignments they had and things of that nature?

A Within reason, yes, sir.

Q OK. Did you at some point in time become aware of an individual who had information by the name of James Leon Smith?

A After it was done, not before.

Q Prior to Mr. Smith coming forward, being the chief investigator, were you aware of any police officer with the sheriff's office or any other agency that had gone to Mr. Smith and asked him to have contact with Mr. Johnson or to give information on Mr. Johnson?

A No, sir.

MR. PICKARD: That's all, Judge.

THE COURT: Thank you. You may inquire.

CROSS-EXAMINATION

BY MR. SHEARER:

Q When was the first time you knew that Mr. Smith was saying that Mr. Johnson had talked to him about the Johnson case?

A Pardon?

Q When was the first time you knew about Smith's allegations that Paul Johnson had talked to him about his case?

A In talking with Earl Troelsen and Bob Wallace after the conversation had taken place.

Q And on what date was that?

A I could not tell you.

Q Would it have been around February the 6th, 1981?

A Well, sir, they had already taken the tape, so it would have been within a day or two after that I'm sure.

MR. SHEARER: No other questions.

THE COURT: Thank you. Any redirect?

MR. PICKARD: No, Your Honor.

THE COURT: May he step down? Thank you.

(Witness excused.)

MR. PICKARD: That's all the witnesses I have on that, Your Honor.

THE COURT: Do you have any other witnesses you want to present?

MR. SHEARER: No other witnesses, Your Honor. I do have argument.

THE COURT: Yes, sir. Go ahead.

MR. SHEARER: May it please the Court. The defense contends that what has been shown factually is that James Leon Smith was an informant for the sheriff's department before he went into the Polk County jail, that he was still a cooperative agent with the sheriff's department in the form of a potential witness. While he was in there, he was still being contacted regarding his previous investigations while he was in the Polk County jail. These being related to cases other than the investigation of Paul Johnson.

According to Mr. Smith's testimony he met with Paul Johnson that first time, no one had asked him to talk about Paul Johnson, but he knew that he was an informant, had been an informant for the Polk County Sheriff's Department. And as he did testify, he did ask Mr. Johnson about his case. He initiated the questions about his case after Mr. Johnson sent them down here regarding the hair samples. So that does establish that Mr. Smith did initiate the questioning regarding Mr. Johnson's charges and the case against him. The--

after--according to Mr. Smith's testimony, after he had had three conversations with Mr. Johnson, the second of which he did not substantially talk about the case and the third of which he does not remember the content, he then told the sheriff's investigators about what he had heard allegedly.

After that, what was done has to be taken into consideration very closely by the Court. He did not--Mr. Smith did not have any further conversations with Mr. Johnson until he had moved to the cell immediately beside Mr. Johnson. James Smith says that the reason he was moved was because of a problem he had with fellow cell persons. However, he admits that once he was transferred to the second floor he was put in a different cell and not the one that is next to Mr. Johnson. He was put in a cell in eight block. The very same day for a reason for which we can only infer motive or intent, Mr. Smith was moved into a cell very next to Mr. Johnson. After that time he said that Mr. Johnson talked to him about his case. And after that time, he made notations allegedly about these supposed conversations, this occurring after the time when Ben Wilkerson had mentioned to him that he should take notes in order if he has problems remembering things when they were talking about conversations that

Smith had with Johnson.

Your Honor, the defense is not able to present or to find out who exactly put Mr. Smith next to Mr. Johnson in that cell, who moved him from the eight block cell over to the seven block cell where the two of them were side by side in an otherwise generally isolated area where Mr. Smith could then ask Mr. Johnson about his case and write his little diaries.

I ask the Court to take into consideration the totality of the circumstances here where you have a person who had acted as an informant before for the sheriff's department, who after talking with Mr. Johnson reported to them regarding his activities, regarding the conversation he had had and that he had told regarding note taking, that he had then moved to a cell right next to Johnson and that the then takes notes and continues to report to the sheriff's department, turning these notes a number of times, returned back to that sare cell where he had been put next to Mr. Johnson, continues to report out.

The argument that the State may contend, that this is all coincidence I'd say is an argument of sheer folly. To say that a known informant who has already given information that he had a conversation with Mr. Johnson would be coincidentally just put in the cell

very next to Mr. Johnson. I say that is a contention which is sheer folly. And I ask the Court to make a reasonable inference based on the facts which are presented before it. And that is that somebody thought it was a good idea to move Mr. Johnson--excuse me--to move Mr. Smith next to Mr. Johnson.

I ask the Court to take judicial notice it's a generally known fact in this jurisdiction that the Polk County jail in which these two gentlemen were housed at the time is run and operated by the Polk County Sheriff's Department, the very same agency which does or which was and is conducting the investigation against Mr. Johnson in this very same case. The very same agency which was investigating the case had control over where Mr. Smith and where Mr. Johnson was housed. The knew that Mr. Smith was an informant and knew that he had given information about Mr. Johnson. He was put in a cell right next to Mr. Johnson by the same agents and they continued to take his notes. To say that they had not specifically asked him to do anything particular or to obtain this material is ridiculous because what is not explicit is certainly implicit. And the Court has the responsibility of not just looking at form, but looking at substance in matters of this kind, to note and to look beyond the wording, the careful wording that

people might try to use and look at what was really happening. What was really happening was that the sheriff's department knew what Mr. Smith was and what he could do and what kind of notes he could take. And he was moved by somebody within the department next to Mr. Johnson. And they knew that. And they knew that he was continuing to report. To say that he was not there as their agent is, I would submit to the Court, ridiculous esrecially when you have a person who has done this before.

I would ask the Court to take these facts into consideration and put them in the light underneath the law which is current in the United States under the Supreme Court opinion on the Henry case as well as the--that Henry case is interpreted by the Florida Supreme Court in the Malone case. The Malone case notes that compensation to the informant is not of importance. As they said in Malone, "Although it does not ostensibly appear in the record that the informant gained any benefit from the State for the disclosure that he was able to obtain from Malone, it was indirect, surreptitious State action which elicited Malone's incriminating statements without assistance of counsel, and therefore violation of Malone's sixth amendment right." The United States Supreme Court in Henry

described what that sixth amendment right is and how it attaches to the defendant in custody. They recite the Messiah case which was a person in custody who was--whose conversations were surreptitiously monitored without notice that he has a right to counsel and--or that he was even being monitored by an agent of the government. The United States Supreme Court says that this is much different than in a case where a person is out of custody and is free on the street and an undercover agent comes up and talks to him and the defendant does not know that he's an undercover agent. It's entirely different when the defendant is in custody, particularly in custody under those same charges for which the informant is asking him questions.

The Henry and Malone case both involve cases like the instant case where you have a jail inmate who has talked to investigators working the case against the defendant who then goes and has conversations with the defendant about his particular case. And I'd say--I'd ask the Court to consider that these cases are very on point and that they are binding on this Court and ask that you follow them in suppressing, I would submit to the Court, all the statements made by--allegedly made by the defendant to Mr. Smith in that he has a government informer before he got in the jail in a continuing

capacity. But regardless of the Court's ruling regarding all the statements, I think the Court is certainly obliged to suppress all the statements that Mr. Smith said were made after the point that he reported to the investigators and was moved to the cell that's next to Mr. Johnson. He knew what he was doing. He was moved there. And they knew he was continuing to report to them. He was from that point on certainly a person who the investigators for the sheriff's department knew was working as an aide to them in the investigation against Mr. Johnson.

And therefore I would say to the Court this establishes that he was an arm of the government. I would not go into the long information of how United States vs. Henry and Messiah cases explain how the government person or agent in any respect is going to talk to the defendant about his charges. He has a right to--the defendant has a right to be advised that he is such a person, that he is such a person working with the government, and that he has a right to counsel and the right not to speak to him.

For those reasons and for the authorities cited and for the facts which are fairly clear especially after Mr. Smith was--talked to the investigators and put in a cell next to Mr. Johnson, I ask that all these

allegedly statements be suppressed, because they are in violation of Mr. Johnson's sixth amendment right to counsel, fifth amendment right not to incriminate himself, and due process rights of law.

Thank you very much.

THE COURT: Thank you. Mr. Pickard, do you wish to respond?

MR. PICKARD: Your Honor, essentially, as I understand it, the bottom line is whether when Mr. Smith was having his conversations with Paul Johnson, whether he at that time was some sort of a government agent or working at the behest or request of some police agency in doing it. And I think that the fact that the police were not even aware of it until after the conversations already happened shows that he was not working as a police agent at the time. I don't think the fact that Mr. Smith in the past been an informant means that if you are an informant once, for now, forever and a day in the future you are always an informant and everything you do on one case necessarily means that you're an informant on anything else you do for the rest of your life. It doesn't work like that especially where it has been a month or 45 days or so before Mr. Johnson was even put in the jail that he had had conversations with any police officer and had nothing to do with

Mr. Johnson because he had not even been arrested then. And Mr. Smith on his own without talking with anybody from a police agency or the State or anyone else decides that he wants to have conversations in the jail with Paul Johnson, if Mr. Johnson wants to trust James Smith and tell him about the case, he runs the risk that Smith may later go to the police. But when Smith had his conversation with Johnson, if it was on his own initiative and was not because the police or anybody told him to do it, then there is nothing illegal or wrong about those conversations. Mr. Johnson just chose to trust the wrong person.

The cases cited by the defense are different from this in the important respect that in both of those cases, the Henry case and the Malone case, prior to any conversations at all that the informant overheard, the informant went to the police or the police went to the informant. And the police were aware that the informant was in a position to obtain statements from the defendant in the jail before the first statement was made. And that's completely different here in that Mr. Smith did not even go to the police until after statements had already been made to him. The police indicated that once they were aware that statements had been made to Mr. Smith they made no request of him, did

not tell him to go back and get more information, simply took down his information and sent him back into the jail. Mr. Smith later got other information and reported it to the police. That's his doings. And that's Mr. Johnson's doings if he wants to trust Smith. But the bottom line is, as I said, it was not done at the request of any police officer or police agency. And under those circumstances, there is no governmental involvement in it. And the statements are not inadmissible.

THE COURT: Thank you. Do you wish to respond?

MR. SHEARER: Just briefly, Your Honor. It seems Mr. Pickard thrusts his whole argument on the statements made before Mr. Smith went to the sheriff's investigators and he speaks about how at that time he--the investigators were not aware of it and he did it on his own.

I would note that Mr. Pickard does not argue strenuously regarding the statements made after he talked to the investigators. Indeed most of the alleged statements that Mr. Smith reports having occurred occurred after the time when he was put in the cell next to Mr. Johnson, after he talked to the investigators, after he started this note taking process. I would say to the Court that regarding that initial conversation or the initial three conversations

that Mr. Smith reported having occurred before he talked to the investigators that this may be a close question for the Court. I still submit our argument regarding the time after he reported to the investigators and they knew what was going on and he was put in the cell next to Mr. Johnson and he did continue to make his notes and reports about any conversations. Those statements certainly, I mean, from that point on Mr. Smith was certainly working as a government agent if they did not explicitly say, "Do this for us," it was implicit in their continuing and their having the initial conversation with Mr. Smith, taking a taped statement of it and continuing to take his notes, etc. The surreptitiousness used by a particular investigating agency cannot overr.de the substance of what the United States Supreme Court is trying to avoid and the Florida Supreme Court as well. The law affords the type of situation where the investigating agency is using individuals to do the work which they are not allowed by law to do. That is to go and question an individual without reading him his rights. And I would say to the Court that the substance of what occurred here is that Mr. Smith after speaking with the investigators especially was from that point on a government person. And those statements certainly from that point on should

certainly be suppressed. Thank you.

THE COURT: Thank you very much. Did you want to want to say anything?

MR. PICKARD: Only that I disagree with that. I don't think just because when someone goes to the police and says, "I have information. Here is the information I have." at that point in time he automatically becomes a government agent and that anything that happens after that is automatically illegal. True, the law says the police cannot request--cannot plant somebody in a jail or in some facility to get information. The law does not say the police have to stop it if they know it's going on as long as they didn't have anything to do with it. If the police--if they want to sit passively by and receive information from someone who is in the jail talking to some other inmate, there's nothing wrong with that as long as they do nothing to cause it to happen. If they don't request it to happen or tell the person to go do it, if they want to sit back and listen to what information is developed, that's fine. But to say that as soon as the inmate Smith comes to the police the first time and says, "I've got information," at that point the police are under an obligation to cut it off and say, "Well, you've done as much as you can do. Anything else in the future

is going to be illegal," I don't think the law says that. The issue is whether the police had anything to do with what Smith was doing. And they did not according to all the testimony from all the police officers and Mr. Smith, Smith did it on his own initiative.

THE COURT: Thank you. Since I gave him one extra, I'll give you an opportunity.

MR. SHEARER: Just briefly. Again, it's obvious what was happening and the fact that the police found a way to do it very surreptitiously does not get around what was happening. I think the movement of the jail cells and the notes and the continuing conversations with the investigators show what was really happening especially after it was reported. He was working for the government. I think it's obvious and I ask the Court to find so. Thank you.

THE COURT: Thank you. Gentlemen, I think Malone is a easily distinguishable case in this particular manner. In Malone there was an elaborate scheme set up by the informant. In that particular case I believe they moved him out of the jail and then had him come in in plain clothes and told him basically what they were after and what they wanted Malone to solicit--excuse me--the undercover informant what they wanted to elicit from Malone in that particular case. So I'm going to in

general just note that the Malone case is there and I believe it's important, but I think it's easily distinguishable. In fact, it's obvious in that case that the officers took an active part in telling the undercover agent in that particular case what to do.

Addressing Henry which is the Supreme Court case, of course, in this particular case I would note also in Henry "the agent told him to be alert to any statements made by the federal prisoners." I also note the question as cited by the majority opinion was whether the government has interfered with the right to counsel of the accused by "deliberately eliciting incriminating statements." As to a concurring separate opinion by Mr. Justice Powell, he states that I believe perhaps the question is a little stated by him, whether the informant's actions constituted deliberate and surreptitious interrogation of the defendant. If they did not, then there would be no interference with the relationship between client and counsel.

Contrary to what Mr. Shearer has related to the Court or what Mr. Shearer asks the Court to infer or imply from the testimony that's been given, there is nothing that hasn't been explained as to the movement of Mr. Smith from one cell to the other. That appears to be done at the direction or cause or direct order

of any of the detectives in this particular case or any of the other officers for their purposes of investigation or surreptitiously or in any other fashion. There appears that Mr. Smith himself by his own testimony and it appeared to the Court, and I'll note somewhat candidly and did not appear to be rehearsed in any fashion, explained his reasons for being moved to that particular cell and, in fact, in cross-examination explained it in a little more detail as being why he was moved to one cell and then over to another cell. In any event, the testimony today is devoid of any suggestion other than a reasonable one as related by Mr. Smith as to why he was placed in that position. Also, the officers have all testified that none of them directed or told or in any fashion tried to get Mr. Smith to elicit these statements from Mr. Johnson especially the first statements. And it gets to be a closer question on the ones where he was making notes. But apparently there were merely, as Mr. Pickard has said, passively receiving those things. Finally Mr. Smith himself testified that he was doing it all on his own. In light of all the testimony that I've heard and in light of the question that I believe this Court needs to answer as related to this Court by the Henry decision and the Supreme Court and adopted obviously

by the Supreme Court in Malone and addressed in Malone, I believe this Court has no choice but to find that the officers did not directly or surreptitiously or in any fashion direct Mr. Smith to do what he did. In light of that, I am going to deny your motion as to Mr. Smith's statements or whatever notes he may have in this particular matter.

MR. SHEARER: Very well, Your Honor. Your Honor, regarding the remainder of the motion regarding the statements allegedly made to Larry Brockelbank, the defense is not prepared to proceed at this time without the availability of Mr. Brockelbank.

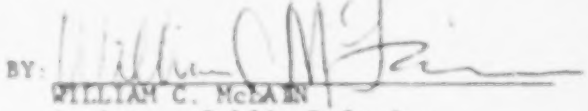
THE COURT: All right. I indicated to you previously before we started I'll consider continuing that so that we have an opportunity to have Mr. Brockelbank testify. I don't know what the mixup was. I don't know whether I signed an order and it just got lost somewhere or whatever. However, we'll look into that after this hearing. And if we need to, we'll sign another order or find the order that was missing and see if we can't get him down here as quickly as possible. And hopefully, we can do that next week sometime. We'll just have to set aside an hour or whatever time we may need.

MR. SHEARER: Thank you, Your Honor.

## CERTIFICATE OF SERVICE

I, WILLIAM C. McLAIN, a member of the Bar of the Supreme Court of the United States and counsel of record for PAUL BEASLEY JOHNSON, the Petitioner, hereby certify that on December 12, 1983, pursuant to Supreme Court Rule 28, I served a single copy of the foregoing Petition for Writ of Certiorari to the Supreme Court of Florida with attached Appendix on each of the parties as follows:

On the State of Florida, The Respondent, by depositing said copy in the United States Post Office, Bartow, Florida with first class postage prepaid, properly addressed to Robert J. Landry, Assistant Attorney General, Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida 33602.

BY: 

WILLIAM C. McLAIN
Assistant Public Defender
Chief, Capital Appeals

Case No. 83-5924

RECEIVED
DEC 15 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

---

PAUL BEASLEY JOHNSON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

---

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

---

Petitioner, PAUL BEASLEY JOHNSON, asks leave to file the attached Petition for Writ of Certiorari to the Supreme Court of Florida without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. In support of this motion, Petitioner states:

1. That he was convicted on September 23, 1981, in the Circuit Court for Lake County, Florida, for three first degree murders, two robberies, two attempted murders, a kidnapping and an arson.

2. That he received a sentence of death for each of his three murder convictions and is presently in custody on Death Row at Florida State Prison.

3. That he appealed to the Supreme Court of Florida, and that Court affirmed all of his convictions and sentences.

4. That he has been represented by appointed counsel throughout his state court appeal proceedings.

5. That his affidavit of insolvency in support of this motion is attached.

Respectfully submitted,

BY: William C. McLain

WILLIAM C. McLAIN
Assistant Public Defender
Chief, Capital Appeals

Case No. 83-5924

IN THE

SUPREME COURT OF THE UNITED STATES

PAUL BEASLEY JOHNSON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

AFFIDAVIT IN SUPPORT OF PETITIONER'S MOTION TO PROCEED IN FORMA PAUPERIS

I, PAUL BEASLEY JOHNSON, being first duly sworn, depose and say that I am the Petitioner in the above-styled case; that in support of my motion to proceed on my Petition for Certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of the proceedings are true:

1. Are you presently employed? Yes____ No x

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. _____

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. January 8, 1981, carpenter, $600 or $700 per month take home.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? Yes____ No x

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months._____

_____

_____

3. Do you own any cash or checking or savings account? Yes____ No x

a. If the answer is yes, state the total value of the items owned._____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes____ No x

a. If the answer is yes, describe the property and state its approximate value._____

_____

_____

5. List the persons who are dependent upon you for support and state your relationship to those persons._____

NONE_____

_____

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Paul Johnson
Petitioner - Paul Beasley Johnson

Subscribed and sworn to before me this 1 day of Dec, 1973.

J W Warren
Notary Public

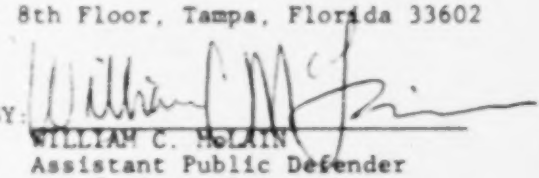
My Commission Expires:

NOTARY PUBLIC, STATE OF FLORIDA
My Commission Expires Oct. 4, 1980

## CERTIFICATE OF SERVICE

I, WILLIAM C. McLAIN, a member of the Bar of the Supreme Court of the United States and counsel of record for PAUL BEASLEY JOHNSON, the Petitioner, hereby certify that on December 12, 1983, pursuant to Supreme Court Rule 28, I served a single copy of the foregoing Motion for Leave to Proceed In Forma Pauperis with attached Affidavit of Insolvency on each of the parties as follows:

On the State of Florida, The Respondent, by depositing said copy in the United States Post Office, Bartow, Florida, with first class postage prepaid, properly addressed to Robert J. Landry, Assistant Attorney General, Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida 33602

BY: 

WILLIAM C. McLAIN
Assistant Public Defender
Chief, Capital Appeals

Hall of Justice Building
455 North Broadway Avenue
Bartow, Florida 33830
(813) 533-1184 or 533-0931

COUNSEL FOR PETITIONER

No. 83-5924

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

PAUL BEASLEY JOHNSON

v.

STATE OF FLORIDA

RESPONSE IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

JIM SMITH
ATTORNEY GENERAL

ROBERT J. KRAUSS
Assistant Attorney General
Park Trammell Building
1313 Tampa Street, Suite 804
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR RESPONDENT

PEGGY A. QUINCE
Assistant Attorney General
Park Trammell Building
1313 Tampa Street, Suite 804
Tampa, Florida 33602
(813) 272-2670

COUNSEL OF RECORD FOR RESPONDENT

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| PRELIMINARY STATEMENT | 1 |
| QUESTION PRESENTED | 1 |
| STATEMENT OF THE CASE | 1 |
| REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI | 2 |
| CONCLUSION | 4 |
| CERTIFICATE OF SERVICE | 4 |


## TABLE OF CITATIONS


| | PAGE |
|---|---|
| Brewer v. Williams, 430 U.S. 387 (1977) | 2 |
| Houston Oil Co. v. Goodrich, 245 U.S. 440 (1918) | 3 |
| Johnson v. State, ___So.2d___ (Fla. 1983) | 1 |
| Massiah v. United States, 377 U.S. 201 (1964) | 2, 3 |
| Rudolph v. United States, 370 U.S. 269 (1962) | 3 |
| Southern Power Company v. North Carolina Public Service Company, 263 U.S. 508 (1924) | 3 |
| United States v. Henry, 447 U.S. 264 (1980) | 2, 3 |

## PRELIMINARY STATEMENT

Respondent accepts those portions of the Petition for Writ of Certiorari setting forth the Citations to Opinions Below, Jurisdiction, Constitutional and Statutory Provisions Involved found on page four of the Petition.

## QUESTION PRESENTED

Whether this Honorable Court should review the factual determination made by the Florida Supreme Court and a Florida trial court concerning whether a jail inmate had become an agent of the State when he, on his own initiative, elicited incriminating information from another inmate who had been indicted for a capital offense.

## STATEMENT OF THE CASE

Petitioner, Paul Reasley Johnson, was tried and convicted of, inter alia, three counts of first degree murder. The Florida Supreme Court affirmed the judgments and sentences of death. Johnson v. State, ___So.2d___ (Fla. 1983)[Petitioner's Appendix at A 1 - A 10].

Prior to trial, Petitioner had moved to suppress admissions of guilt that he made to another jail inmate, James Leon Smith. Smith was also a pretrial detainee in the Polk County Jail and had served as a police informant in the past. Smith initially approached the Petitioner to inquire about the charges against Petitioner (R 1905). Nobody asked Smith to approach Petitioner in regards to the instant case (R 1905, 1919, 1923, 1931-1933). Mr. Smith reported his first conversation with Petitioner to the Polk County Sheriff's Department two days afterward (R 1908). At that time, they did not encourage Mr. Smith to continue these conversations or to record them in any manner (R 1909). Mr. Smith also contacted an investigator with the Sheriff known to him personally, Mr. Ben Wilkerson (R 1909-1910). Mr. Wilkerson,

according to Mr. Smith, did not inquire about any future conversations, the recording of same, or even the taking of notes (R 1910). In fact, Mr. Smith did state that the idea of taking notes of his conversations with Petitioner was his own invention (R 1910). Mr. Smith, after talking to the investigators, was moved to a cell beside Petitioner (R 1912). However, he explained the move was prompted by an argument he and his jail counselor had gotten into (R 1920), and that he did not request such a move (R 1920). Mr. Smith further explained that he was not transferred directly to a cell next to Petitioner, but because the lights were out in another cell block, he did end up side-by-side with Petitioner (R 1921).

At the Motion to Suppress hearing, Petitioner claimed that Smith was acting as a State agent and had illegally obtained incriminating statements from Petitioner in violation of Petitioner's right to counsel. The trial court denied the Motion. On appeal, the Supreme Court of Florida affirmed and specifically found that the trial court ruling that Smith had not become an agent of the State was supported by the evidence.

## REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

Petitioner is requesting this Honorable Court to determine the definition of "agent of the government" for purposes of the rule announced in Massiah v. United States, 377 U.S. 201 (1964). However, it is apparent that Petitioner requests this Honorable Court to rule on a pure question of fact, a question which does not necessitate a new or unique rule of law.

In Massiah, supra, United States v. Henry, 447 U.S. 264 (1980), and Brewer v. Williams, 430 U.S. 387 (1977), the issue involved whether a government elicitor obtained information from an accused in the absence of counsel. In other words, it was necessary to determine whether information had been deliberately elicited by a government agency, the agency relationship being assumed in those cases. Of the three cases cited above by your

Respondent, the facts in Henry more closely approximate the facts of this cause than do the facts in the other cases. However, Henry is easily distinguishable from the instant cause in that the elicitor in Henry was "expressly commissioned to secure evidence." Henry at 447 U.S. 273. Sub judice, however, the purported elicitor did not ask for any benefit or favorable treatment in exchange for any information he might acquire, nor did the government promise the elicitor that he would receive favorable treatment. The elicitor was not compensated or commissioned to secure evidence as was the elicitor in Henry.

Thus, Petitioner herein merely seeks to have this Honorable Court exercise its certiorari jurisdiction in order to define the term "agent" for the purposes of the Massiah rule. However, it is apparent that such a factual determination must be made on a case-by-case basis. This Honorable Court has dismissed writs of certiorari as improvidently granted on the ground that the issues were merely factual ones which would be of no importance except to the litigants themselves. See, e.g., Rudolph v. United States, 370 U.S. 269 (1962); Southern Power Company v. North Carolina Public Service Company, 263 U.S. 508 (1924); Houston Oil Company v. Goodrich, 245 U.S. 440 (1918). The instant cause also represents a case wherein only factual issues need to be determined. Inasmuch as the existence of an agency relationship must be determined in each individual case, it is unnecessary for this Honorable Court to exercise its certiorari jurisdiction to determine whether or not an agency relationship existed in the instant case. The Florida trial court, and subsequently the Florida Supreme Court, determined that an agency relationship did not exist. The Florida court followed the applicable law, including this Honorable Court's decision in Henry, supra, and determined that an agency relationship did not exist.

Inasmuch as Petitioner's instant claim involves a factual determination which must be made on a case-by-case basis, this Honorable Court should decline to exercise its certiorari jurisdiction.

## CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

Peggy A. Quince

PEGGY A. QUINCE
Assistant Attorney General
Park Trammell Building
1313 Tampa Street, Suite 804
Tampa, Florida 33602
(813) 272-2670

COUNSEL OF RECORD FOR RESPONDENT

Robert J. Krauss

ROBERT J. KRAUSS
Assistant Attorney General
Park Trammell Building
1313 Tampa Street, Suite 804
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR RESPONDENT

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail to William C. McLain, Esquire, Assistant Public Defender, Chief, Capital Appeals, Tenth Judicial Circuit, Hall of Justice Building, 455 North Broadway Avenue, Bartow, Florida 33830 on this the 12th day of January, 1984.

Peggy A. Quince
Of Counsel for Respondent

Robert J. Krauss
Of Counsel for Respondent